In the

United States

Court of Appeals

For the Ninth Circuit

In the Matter of the Application for a Writ of Habeas Corpus of GEORGE D. LATIMER, *Appellant*,

v.

JOHN R. CRANOR, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington, *Appellee*.

No. 12563

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT

Appellant originally filed a petition for a writ of habeas corpus with the Supreme Court of the State of Washington which was denied without opinion by entry in the motion docket of said court on October 11, 1940, in Volume 8 at page 267 of said docket. A petition for rehearing on this matter was denied without opinion by the Supreme Court of the State on October 30, 1940, by order entered in the Journal of the court in Volume 36, page 212. A petition to the United States Supreme Court

for a writ of certiorari to the Washington court was denied on March 3, 1941. *Latimer v. Smith,* 312 U. S. 694, 61 S. Ct. 731, 85 L. ed. 1129. Appellant applied for a writ of error *coram nobis* to the Supreme Court of Washington, which application was dismissed without opinion by order of that court on November 27, 1941, entered in the court Journal, Volume 36 at page 382. On September 9, 1949, a petition for writ of habeas corpus to the Supreme Court of the State was denied without opinion by that court and an entry in the Motion Docket in Volume 9 at page 269.

Appellant thereafter petitioned the United States District Court for the Eastern District of Washington for a writ of habeas corpus (Tr. 3-5). An order was issued by the District Court to show cause why the writ should not issue (Tr. 5-6). Upon a hearing on said order (Tr. 10-40), the District Court ordered that the writ be denied on March 16, 1950 (Tr. 52-53). Thereafter appellant was granted a certificate of probable cause by the District Court (Tr. 54-55). Without citing authority for the jurisdiction of the District Court, appellant alleges in his petition below that he is held in custody in violation of the Constitution of the United States. This is a proper ground for invoking the jurisdiction of the United States District Court under 28 U. S. C. 2241. However, it is appellee's contention that the District Court did not have jurisdiction for the reason that appellant did not exhaust all the remedies available to him under the Laws of the State of Washington as required by 28 U. S. C. 2254. This contention will be discussed in detail as part of appellee's argument in support of the order of the District Court denying the writ.

STATEMENT OF THE CASE

Appellant is confined in the Washington State Penitentiary at Walla Walla in custody of appellee herein by authority of a judgment and sentence entered August 30, 1937, by the Superior Court of Stevens County, adjudging appellant to be guilty of the crime of first degree forgery and imposing as punishment therefor a term of twenty years' imprisonment. Appellant was released from the State Penitentiary on parole in July, 1935, and discharged from parole supervision in June, 1946, by order of the Board of Prison Terms and Paroles of the State of Washington (Tr. 41). Appellant's parole was revoked by order of said board in March, 1949. Appellant was again paroled in November, 1949, this parole was revoked January 18, 1950 (Tr. 50), and appellant was returned to the custody of appellee on February 4, 1950 (Tr. 52-53).

In his petition to the District Court appellant contends that his present confinement is void inasmuch as his original plea of guilty was obtained under duress. Appellant offered no evidence in this respect at the hearing below, and his principal contentions appear to be, initially, that the Board of Prison Terms and Paroles of the State of Washington was without authority to return him to confinement after discharging him from parole supervision; secondly, that the Board had no jurisdiction to determine the length of appellant's confinement. This latter contention is based on the allegation that appellant was confined under Chapter 114, Laws of Washington, 1935, which law required the discharge of a convicted person upon the serving of his minimum term of confinement as fixed by the Board of Prison Terms and Paroles. It is

appellant's position that the 1939 amendment to Chapter 114 operated ex post facto as to appellant in violation of Article I, section 10 of the Constitution of the United States. Appellant's argument on appeal appears to be confined to this contention, and he relies on a memorandum opinion of the Superior Court of the State of Washington for Yakima County. It is appellee's position that the 1939 amendment effected no substantial change in the law under which appellant was confined and that the above mentioned memorandum is not in point.

ARGUMENT

I.

The District Court did not have jurisdiction to entertain appellant's application for a writ of habeas corpus because appellant had not exhausted his state remedies at the time of petitioning for a writ of habeas corpus in the District Court.

Federal Courts are without authority to grant an application for a writ of habeas corpus on behalf of a person detained pursuant to a judgment of a state court until such person has exhausted his remedies in the courts of the state before making application in a court of the United States. 28 U. S. C. 2254 provides:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

One of appellant's contentions in his petition to the District Court is that the Board of Prison Terms and Paroles was without jurisdiction to order his reconfinement in 1949 after having discharged him from parole supervision in 1946. This contention, as a matter of chronology, could have been raised only after he had been returned to custody, that is, in 1949 or thereafter. An examination of the records of the Washington State Supreme Court indicates that between March 3, 1941, when

his application for a writ of certiorari from the United States Supreme Court was denied, and the time of his application for a writ of habeas corpus in the District Court, appellant made only one application for a writ of habeas corpus in the Washington State Supreme Court which was denied on September 9, 1949. Appellant does not allege and the record does not show that an application for a writ of certiorari was made to the United States Supreme Court to be directed to the Washington court to review that denial. Nor does appellant allege or the record show that a petition for a writ of error *coram nobis* was made to the Washington State Supreme Court. In *Darr v. Burford*, decided April 3, 1950, 339 U. S. 200, 70 S. Ct. 587, 94 L. ed. 511, the United States Supreme Court held that an application for a writ of certiorari in the Federal Supreme Court to the State Supreme Court is a state remedy within the intendment of 28 U. S. C. 2254. To the same effect see *Cooper v. Cranor*, decided May 8, 1950, by this court. This court has held also in the cases of *Barton v. Smith*, 162 F. (2d) 330, and *Hampson v. Smith*, 162 F. (2d) 334, that a person confined in the State of Washington pursuant to a judgment of a court of the state must seek relief by applying for a writ of error *coram nobis* to the state court, even though the precise ambit of the writ has not been marked by the Washington court. A writ of error *coram nobis* is thus likewise considered to be a remedy available to persons confined in this state within the meaning of 28 U. S. C. 2254.

Appellant does not claim, nor does the record indicate, that there is an absence of available state process or that circumstances exist which render such process ineffective to protect his rights. State process being adequate and available to correct the alleged error in return-

ing appellant to the penitentiary in 1949, appellant's failure to apply for a writ of certiorari to the United States Supreme Court or to apply for a writ of error *coram nobis* to the Washington State Supreme Court must bar him from applying for a writ of habeas corpus in the Federal District Court.

II.

Appellant's discharge from supervision did not constitute a final release from confinement or satisfaction of judgment.

The Washington law, Chapter 114, Laws of 1935, as amended by Chapter 142, Laws of 1939 (Rem. Rev. Stat. Supp. 10249-1 et seq.), and Chapter 92, Laws of 1947 (10249-2, Rem. Supp. 1947), provides that upon conviction of a crime the sentencing court shall impose only the maximum term of imprisonment. Within six months after admission of such convicted person to the penitentiary or reformatory the State Board of Prison Terms and Paroles has the duty of fixing the duration of confinement for such prisoner. Until a prisoner has served his duration of confinement period, less good time credits, he is not eligible for parole consideration. When he has served such period he may be permitted to leave the confines of the penitentiary under such rules and regulations as the Board shall establish. In referring to Chapter 114, Laws of Washington, 1935, the Supreme Court of the United States in *Lindsey v. State of Washington*, 301 U. S. 397, 57 S. Ct. 797, 81 L. ed. 1182, stated as follows at page 798 (see appellant's Brief on Appeal, page 7):

> "* * * Under it the prisoners may be held to confinement during the entire fifteen year period. Even if they are admitted to parole, to which they become eligible after the expiration of the terms fixed

> by the board, they remain subject to its surveillance and the parole may, until the expiration of the fifteen years, be revoked at the discretion of the board * * *."

The discharge from supervision granted appellant in 1946 merely removed some of the conditions ordinarily incident to parole; it did not satisfy the sentence or waive the right and duty of the Board to maintain jurisdiction over the person of the parolee. The Board of Prison Terms and Paroles did not have the authority under the 1935 act or amendments thereto to completely discharge the appellant by irrevocably waiving jurisdiction over his person. Inasmuch as the statute permits the Board to return the paroled person to the confines of the penitentiary at its discretion, the Board was acting within its powers in revoking appellant's paroles.

III.

There has been no violation of the ex post facto prohibition of the Constitution of the United States.

It is appellant's final contention that the amendments to Chapter 114, Laws of 1935, under which laws he was confined, constitute a violation of the ex post facto provisions of the Federal Constitution. The material sections of Chapter 114 provide in part as follows:

> "The board of prison, terms and paroles may permit a convicted person to leave the buildings and enclosures of the penitentiary or the reformatory, as the case may be, on parole, after such convicted person has served the period of confinement fixed for him or her by the board of prison, terms and paroles, less time credits for good behavior and diligence in work as provided for by this board: *Provided*, That in no case shall the inmate be credited with more than one-third of his sentence as fixed by the board.

> "The board of prison, terms and paroles shall have the power to establish rules and regulations under which a convicted person may be allowed to leave the confines of the penitentiary or the reformatory on parole, and shall also have the power to return such person to the confines of the institution from which he or she was paroled, at its discretion."

Section 4 of Chapter 114 was amended by Chapter 142, Laws of 1939, by the addition of the following language:

> "* * * *Provided further*, That no prisoner shall be released from the penitentiary or the reformatory unless, in the opinion of the Board of Prison, Terms and Paroles, his rehabilitation has been complete and he is a fit subject for release, or until his maximum term expires."

Appellee submits initially that there has been no substantive change in law by virtue of the 1939 amendment. Under the 1935 law, as interpreted by *Lindsey v. State of Washington, supra*, the Board of Prison Terms and Paroles was authorized to establish conditions of parole and to return a convicted person to confinement at its discretion. It had no power to terminate the sentence imposed by the court, nor was it given that power by the 1939 amendment. The additional language of Chapter 142, Laws of 1939, simply states what was part of the existing law by necessary implication. It only sets forth a standard to guide the Board in determining when an applicant for parole may properly be released on parole.

Assuming for this argument, that the 1939 amendment effected a substantive change in the law relating to parole, appellant has still not stated any grounds for the invocation of Article I, section 10. Parole has long been considered by the courts of the State of Washington to be a privilege and not a right. See *In re Pierce v. Smith*, 31 Wn. (2d) 52, 195 P. (2d) 112; *In re Grieve v. Smith*, 26

Wn. (2d) 156, 173 P. (2d) 168; *Fathers v. Smith*, 25 Wn. (2d) 896, 171 P. (2d) 1012; *State ex rel. Linden v. Bunge*, 192 Wash. 245, 73 P. (2d) 516. In *Milliken v. McCauley*, 20 F. Supp. 202, the District Court held, in construing the precise statute now under consideration, that parole is a matter within the discretion of the Board of Prison Terms and Paroles.

In *People ex rel. Kurzynski v. Hunt*, 25 F. Supp. 647, the laws of New York State relating to revocation of paroles were altered after petitioner's conviction and confinement. The court said:

> "'* * * When petitioner was accorded this privilege and was released on parole, he took it with conditions thus attached to it by law, including the method then provided for determining parole violations. There was no constitutional guaranty when sentence was imposed upon petitioner that the provisions regarding parole and for determining violations thereof would remain constant. The only constitutional inhibition was that no law would be passed that would increase the punishment for the crime he had committed. * * *'"

The penalty for the crime for which appellant was convicted and sentenced has at no time material to this case been increased. The punishment was confinement for twenty years. In order to prevail, appellant must show that there has been such a change in the law between the commission of the crime and the sentence therefor as to subject him to an additional penalty. This has not been shown. It is appellee's position, therefore, that even had the laws relating to parole been so amended as to render the terms and conditions of that privilege more onerous, there has been no deprivation of a *right* within the intendment of the ex post facto provision.

The memorandum opinion issued by the Superior Court for Yakima County and relied upon by appellant in his Opening Brief does not present the issues on which his appeal is grounded. In the instant situation, appellant's allegation is that he was sentenced and confined under laws in force in 1935 and that amendments subsequent thereto operated in violation of the ex post facto prohibition of the Federal Constitution. In the situation to which the Yakima Court's opinion is directed, the petitioner therein complained that he was confined under laws in force prior to the time when Chapter 114, Laws of 1935, became effective, but that the 1935 laws had been illegally applied. The memorandum opinion of the Yakima Court is therefore not material to the case at hand.

CONCLUSION

It is appellee's position that the District Court was without authority to entertain appellant's application for a writ of habeas corpus because appellant had not exhausted the remedies available to him under the laws of the State of Washington; that appellant has not been discharged from the sentence under which he is now confined; and that his confinement is not in violation of the ex post facto provisions of Article I, section 10 of the Constitution of the United States. Appellee prays that the District Court's order denying the writ of habeas corpus be affirmed.

Respectfully submitted,

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